Senior Executives Association

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TESTIMONY

of

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HOUSE GOVERNMENT REFORM COMMITTEE

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The Senior Executives Association (SEA) would like to thank Chairman Davis, Ranking Member Waxman and the members of the Committee on Government Reform for the opportunity to testify before you on current and proposed laws protecting whistleblowers from retaliation, particularly as current protections have been impacted by the Supreme Court's recent decision denying First Amendment constitutional protection to public employees who, in the context of their day-to-day job duties, make disclosures that are in the public interest.

The Senior Executives Association represents the interests of career federal executives in the Senior Executive Service (SES), and those in Senior Level (SL), Scientific and Professional (ST), and equivalent positions. SEA is pleased to offer the perspective of the career Senior Executive regarding whistleblower reform and First Amendment protection for federal employees.

Over the last decade, whistleblower protection for federal employees has eroded because court decisions have limited the impact of the Whistleblower Protection Act. The Supreme Court's decision in Garcetti v. Ceballos further erodes those protections and provides an impetus for Congress to act.

Career Senior Executives are uniquely situated because they need strong tools to manage their employees, but also need protection when they observe and disclose wrongdoing. They themselves can be whistleblowers, but at the same time they need to manage others who claim to have blown the whistle. Hence, from our perspective, the challenge in any whistleblower reform is to strike a balance where federal employees are encouraged to report wrongdoing and are assured of protection from reprisal, yet at the same time to ensure that federal workforce managers have the needed tools to manage effectively.

The classic nightmare whistleblower scenario for managers occurs when a difficult or vexing "whistleblower" employee becomes so entrenched in his or her position that the employee refuses, in an often subtle and sophisticated manner, to carry out the direction of the supervisor, thus effectively sabotaging a project that the whistleblower dislikes. Occasionally, an otherwise problem employee uses whistleblower status to become immune from reasonable supervisory direction. This, too, ties a supervisor's hands.

Reassignment of a vexing and uncooperative employee or efforts to improve poor performance could be considered a violation of the Whistleblower Protection Act (WPA) if the employee makes disclosures asserting some wrongdoing, without regard to whether the employee's allegations are true or accurate. Due to erroneous or incomplete perceptions about the WPA, a whistleblower often is allowed to poison a workplace environment so that over time it becomes increasingly dysfunctional. Even more challenging for a manager is the need to continue to manage the whistleblower who remains in the workplace and who must be evaluated and subjected to workforce rules like all other employees. Unpleasant but necessary management decisions may constitute an additional basis for the whistleblower to claim reprisal.

On the other hand, current interpretations of the Whistleblower Protection Act fail to adequately defend federal employees because these interpretations do not recognize that whistleblowing activity sometimes occurs in the form of disclosures made directly to the person violating the law or engaging in the wrongdoing. Whistleblowing also occurs when the employee is just doing his or her job, the precise issue before the Supreme Court in Garcetti v. Ceballos. Under current law, neither disclosure is protected under the WPA.

The Supreme Court's decision is remarkably similar to interpretations of the Whistleblower Protection Act that have been applicable to federal employees for many years as result of earlier decisions by the United States Court of Appeal for the Federal Circuit. The Supreme Court has held that a disclosure that is just part of a public employee's job is not protected under the First Amendment. This failure to protect the messenger of unwanted news is a major flaw that should be fixed. SEA supports this change. After all, senior managers and executives are often perceived as being whistleblowers themselves, and they need assurances of nonreprisal when higher level managers are told that a particular action is illegal.

The Supreme Court has sent a message to Congress and state legislatures that protection of public employees who disclose wrongdoing is a policy question to be settled by lawmakers. SEA believes that much of the reform that is needed is contained in S. 494, which just last week was included by the Senate as a part of this year's Defense Authorization Bill. Whether S. 494 become law, and in what form, will be resolved in conference.

SEA is generally supportive of S. 494 and applauds the Senate's work in finding a solution to this continuing problem. However, we are very concerned with the provision in the bill that allows appeals of Merit Systems Protection Board decisions in whistleblower cases to multiple Circuit Courts of Appeals, rather than to the Court of Appeals for the Federal Circuit as is the current practice. Laws concerning whistleblower reprisal are already too complicated, and it is sometimes difficult for a federal manager to distinguish between whistleblowers and problem employees. Differing interpretations by different courts of appeals will add to this complexity. The result will be inaccurate and mistaken perceptions about employee job protections which will serve as a deterrent to managers attempting to deal effectively with problem employees.

S. 494 includes a provision not present in the current Whistleblower Protection Act specifically stating that disclosures related to a policy decision are not protected disclosures. The report accompanying S. 494 notes SEA's support of this provision, and states that it provides an important tool to managers so that an employee's mere disagreement with a policy cannot serve as a basis for whistleblower protection.

SEA believes this is an important provision. While a whistleblower is still appropriately protected under S. 494's policy provision if the whistleblower makes a specific disclosure of wrongdoing, if enacted it will allow a fact finder to determine whether a federal employee is disclosing actual wrongdoing as opposed to simply engaging in obdurate, vexing behavior related to important policy questions, disguised as whistleblowing.

The most important feature of the S. 494 is the expansion of the definition of a disclosure to include "any" disclosures. The Court of Appeals for the Federal Circuit has interpreted current law as not protecting disclosures: made only to a wrongdoer, such as an offending supervisor; made in connection with job duties, reiterating previously known information; or information released only to other coworkers. This is designed to change this precedent.

SEA agrees with this important change to the Whistleblower Protection Act. The government must protect an employee who is vigorously disclosing a supervisor's wrongdoing only to that supervisor in the hope that the supervisor will correct the behavior. Failure to do so will encourage employees to expand their "sounding of the alarm." For example, employees who do not receive this protection have often felt it necessary to disclose wrongdoing to the media to receive protection.

Employees who disclose wrongdoing as part of their jobs also need whistleblower protection. While career, nonprobationary employees are protected because they cannot be fired or demoted for just doing their jobs, whistleblower reprisal can often occur quite efficiently with far less serious disciplinary actions like details and reassignments. Also, probationary and temporary employees need protection for disclosing unpleasant news as part of their jobs.

Current whistleblower law allows a manager to avoid a finding of reprisal by showing that a disciplinary action would have occurred anyway despite the presence of whistleblowing activity by an employee. This provision seems to work reasonably well in allowing managers to fulfill their function of managing the federal workforce. The Senate bill contains a provision clarifying a manager's ability to avoid a finding of reprisal by showing that a personnel action would have happened anyway. In addition, the provision discussed above about not protecting policy disclosures seems to us to be a sufficient check on any excesses that might occur as a result of the expansion of protection to encompass "any" disclosure as required in the Senate bill.

In the House, Congressman Platts' work on H.R. 1317, which has been referred out of this Committee, has similar provisions to the Senate bill. However, it does not have S. 494's provision about policy disclosures not being protected. Also, it does call for review of whistleblower decisions only in the Court of Appeals for the Federal Circuit, as recommended by SEA, but it then creates a new right to seek review in federal court if the Office of Special Counsel or the Merit Systems Protection Board does not act timely. SEA opposes any expansion of the procedure under the Whistleblower Protection Act as envisioned by H.R. 1317. MSPB appeals of whistleblower cases now occur in a timely fashion and work reasonably well. A need to bypass the MSPB has not presented itself or been supported by convincing evidence.

In summary, we support some change to the current whistleblower protection laws as they pertain to federal employees. The Supreme Court's recent decision is an invitation to make this change. We believe the Senate's S. 494 provides at least a partial model for this reform. SEA recommends that H.R.1317 be amended to incorporate the features of S. 494, except the provision for a five-year experiment to allow appeals to Circuit Courts of Appeals in addition to the Federal Circuit. We believe this will be a sufficient change to protect whistleblowers and to allow managers the ability to manage effectively.

On behalf of SEA, I thank the Committee for the opportunity to testify on this important topic. We hope to continue to work with your staffs to ensure employees receive strong and appropriate protections when reporting wrongdoing, while ensuring managers are not held powerless during endless legal battles.